Since much of Rosenfeld's appeal hinges on joinder and severance, we show the following analysis of the entire indictment:

Count	Defendants Named	Code Sec.
I	Cutler & Rosenfeld	18 U.S.C. § 1010
II	Cutler & Rosenfeld	18 U.S.C. § 371
III	Cutler & Wagner	18 U.S.C. § 1010
IV	Cutler & Wagner	18 U.S.C. § 371
V	Cutler & Robertson	18 U.S.C. § 1010
VI	Cutler & Robertson	18 U.S.C. § 371

Counts III and IV were severed for trial and Rosenfeld was convicted by a jury on the second count. It is clear that the gravamen of the indictment lies in 18 U. S. C. § 1010. Rule 8(b), Federal Rules of Criminal Procedure, 18 U. S. C. is standing refutation of Rosenfeld's argument in support of severance or faulty joinder:

> "Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

Nothing we said in our majority decision of *U. S.* v. *Tuffanelli*, 131 F. 2d 890 (7th Cir. 1942), decided before that Federal Rule was adopted, collides with it. A clearly discernible pattern of action involving Cutler and his salesmen is traceable from the face of this record. *McElroy* v. *United States*, 164 U. S. 76 (1896) pressed on us by defendant, being factually dissimilar from the offenses spelled out in the indictment accusing Rosenfeld fails in lending strength for his position.

Government exhibits 2B and 4B, contracts of sale "Consolidated Home Improvement Co.," each bear the signatures of Rosenfeld and Cutler; exhibits 2A and 4A, signed

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by Rosenfeld are F.H.A. Credit Applications, each showing Consolidated as the contractor. All the other contracts and credit applications, received in evidence, are in the name of Consolidated by Cutler and signed by other co-defendant salesmen. Section 1010 permeates this indictment and case. We think the indictment is sufficient and proper. *Wong Tai* v. *U. S.*, 273 U. S. 77 (1927); *U. S.* v. *Lotsch*, 102 F. 2d 35 (2nd Cir. 1939).

This record impressively attests the want of merit in defendant's position concerning his motions for judgment of acquittal, for a new trial, arrest of judgment and his challenge directed at the sufficiency of evidence underlying the jury's verdict. *Glasser* v. *United States*, 315 U. S. 60 (1942), *United States* v. *Aman*, 210 F. 2d 344 (7th Cir. 1954), and *United States* v. *Thayer*, 209 F. 2d 534 (7th Cir. 1954). Acting as Consolidated's salesman, Rosenfeld called upon Herbert Ray Johnson on February 9, 1954, and told him that his home had been selected to advertise siding. For each sale of this item, Rosenfeld told Johnson, the latter would receive $50 and these siding sales would pay his loan. When Johnson stated he was financially unable to undertake a contract, Rosenfeld offered him $300 to pay up his bills. As a result of the promises and bonuses, Johnson, his wife, and Rosenfeld signed the loan papers (Exhibits 2A-2B). Under the contract terms, Consolidated agreed to furnish all material and labor; the cash price, $1390, was to be financed under F. H. A. Title I. Absent from this contract is any mention of the $300 or the $50 per siding recitation. Government exhibit 2A, F. H. A. Title I Credit Application, executed by the Johnsons, and Rosenfeld, was transmitted to the Old National Bank, Evansville, Indiana.

Though Rosenfeld had been informed by Johnson concerning the latter's financial inability, and about various time payments to which he was committed, Rosenfeld cer-

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tified, on Exhibit 2A: "I(We) certify that the above statements are true and that no unfavorable information known to me(us) or called for herein has been omitted. This application shall remain the property of the lending institution to which submitted." Of course, this exhibit is a credit application, and Johnson's purchasing of a furnace, ice-box, and television set were not reported on that form. Cutler, on the other hand and for his part, executed F. H. A. Title I completion certificate, for Johnson's project and forwarded it to the Old National Bank. A loan, resulting from the aforesaid contract, application and certificate was subsequently made by that institution and insured by F. H. A. Within a week of their first conversation, Rosenfeld gave Johnson $300, however the latter never received any $50 payments. There is evidence of similar approaches, contacts, and arrangements by Rosenfeld with other persons.

Since none of defendant Rosenfeld's points yield reversible errors, and because we find the record remarkably free of such errors, the judgment brought here for review is affirmed.

Judgment affirmed.

SCHNACKENBERG, *Circuit Judge.* I concur.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX II.

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

Chicago 10, Illinois.

Friday, June 29, 1956.

THE UNITED	STATES OF AMERICA, *Plaintiff-Appellee,*	Appeal from the United States District Court for the Southern District of Indiana, Evansville Division.
No. 11656	*vs.*	
JOHN D. ROS	SENFELD, *Defendant-Appellant.*	

Before Hon. PHILIP J. FINNEGAN, Hon. H. NATHAN SWAIM, Hon. ELMER J. SCHNACKENBERG, *Circuit Judges.*

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Indiana, Evansville Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED.

APPENDIX III.

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

Chicago 10, Illinois.

Monday, September 10, 1956.

THE UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. JOHN D. ROSENFELD, *Defendant-Appellant.*	Appeal from the United States District Court for the Southern District of Indiana, Evansville Division.

No. 11656

Before Hon. PHILIP J. FINNEGAN, Hon. H. NATHAN SWAIM, Hon. ELMER J. SCHNACKENBERG, *Circuit Judges.*

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

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APPENDIX IV.

Rule 8, of the Federal Rules of Criminal Procedure, reads as follows:

"RULE 8, JOINDER OF OFFENSES AND OF DEFENDANTS.

(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

18 U. S. C. A., pages 179-180.

Count II of Indictment was based under Title 18 U. S. C. 371:

"SEC. 371. CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD UNITED STATES.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

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If, how
object of ver, the offense, the commission of which is the
ishment he conspiracy, is a misdemeanor only, the pun-
punishm r such conspiracy shall not exceed the maximum
t provided for such misdemeanor."

The st U. S. C., Sec. 371.

Indictme ute of the United States alleged in Count II of
"SEC. to have been violated is 18 U. S. C., Sec. 1010:
TIONS. 10. FEDERAL HOUSING ADMINISTRATION TRANSAC-
Whoe
vance of , for the purpose of obtaining any loan or ad-
or corpo redit from any person, partnership, association,
of credit tion with the intent that such loan or advance
Housing shall be offered to or accepted by the Federal
of obtain dministration for insurance, or for the purpose
of credit g any extension or renewal of any loan, advance
the acce r mortgage insured by such Administration, or
such a l nce, release, or substitution of any security on
fluencing n, advance of credit, or for the purpose of in-
makes, p n any way the action of such Administration,
the same ses, utters or publishes any statement, knowing
instrume o be false, or alters, forges, or counterfeits any
passes a , paper, or document, or utters, publishes, or
ing it to rue any instrument, paper, or document, know-
willfully ave been altered, forged, or counterfeited, or
be fined vervalues any security, asset, or income, shall
two year t more than $5,000 or imprisoned, not more than
or both."

U. S. C. A., Sec. 1010.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Rule involved	2
Statement	3
Argument	8
Conclusion	12

CITATIONS

CASES:

Blumenthal v. *United States*, 332 U.S. 539	10
Castellini v. *United States*, 64 F. 2d 636	9
Coco v. *United States*, 289 Fed. 33	9
Dunaway v. *United States*, 205 F. 2d 23	10
Gallaghan v. *United States*, 299 Fed. 172	9
Glasser v. *United States*, 315 U.S. 60	11
Kivette v. *United States*, 230 F. 2d 749	9
McElroy v. *United States*, 164 U.S. 76	9
Opper v. *United States*, 348 U.S. 84	11
Ross v. *United States*, 197 F. 2d 660	9
Scheve v. *United States*, 184 F. 2d 695	9
United States v. *Aman*, 210 F. 2d 344	11
United States v. *Hack*, 205 F. 2d 723	11
United States v. *Liss*, 137 F. 2d 995	9
United States v. *Thayer*, 209 F. 2d 534	11
United States v. *Tuffanelli*, 131 F. 2d 890	9

RULE:

Federal Rules of Criminal Procedure, Rule 8 ..... 2, 8, 9

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 488

JOHN A. ROSENFELD, *Petitioner,*

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. I 21-24) is reported at 235 F. 2d 544.

JURISDICTION

The judgment of the Court of Appeals was entered on June 29, 1956 (Pet. App. II 25). A petition for rehearing was denied on September 10, 1956 (Pet. App. III 26). The petition for a writ of certiorari was

filed on October 8, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a joint indictment charging petitioner and other co-defendant salesmen in separate counts, each with unlawfully procuring an F.H.A. insured loan in combination with defendant Cutler, and each with conspiring with defendant Cutler to procure such loans, charged transactions which could properly be joined under Rule 8, F. R. Crim. P.

2. Whether petitioner's conviction under the conspiracy count is supported by substantial evidence.

RULE INVOLVED

Rule 8 of the Federal Rules of Criminal Procedure provides:

> (a) *Joinder of Offenses.* Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
>
> (b) *Joinder of Defendants.* Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and

all of the defendants need not be charged in each count.

STATEMENT

In the United States District Court for the Southern District of Indiana, petitioner was jointly tried with three other defendants—Cutler, Robertson and Jack Johnson. Petitioner and Cutler alone were named as defendants in Counts I and II charging that, with intent that an F.H.A. loan be obtained by purchasers of siding, they uttered an F.H.A. completion certificate, falsely warranting that the price of the siding represented the entire consideration for a loan, and further charging a conspiracy to commit that offense. The other two counts which were tried (Counts V and VI[1]) charged a similar utterance by Cutler and Robertson and a similar conspiracy among Cutler, Robertson and Jack Johnson (R. 5-9).[2] Petitioner's motion before trial for a severance had been denied (R. 2, 10-13). The jury found petitioner and Cutler guilty under counts I and II, and returned a verdict of acquittal as to all defendants on the other counts (R. 2-3, 18; Tr. 878-880). On October 27, 1954, the court sustained petitioner's motion for acquittal under count I and overruled his motion for a new trial and for arrest of judgment under count II (R. 3, 20-23). Petitioner was

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[1] Counts III and IV alleging similar substantive and conspiracy charges against Cutler and another salesman, Wagner, had been severed before trial (R. 2). It appears that this severance was granted for reasons unconnected with the merits of this petition, namely that Wagner did not have counsel present at the day of trial. Defendant's Brief, Court of Appeals, p. 3.

[2] "R." refers to the printed record. "Tr." designates the typewritten Reporter's Transcript of the trial.

sentenced to two years imprisonment under count II (R. 24-25). The Court of Appeals unanimously affirmed the conviction (Pet. App. I 21-24).

Petitioner and co-defendants Robertson and Jack Johnson were employed by the Consolidated Home Improvement Company of Evansville, Indiana—owned by defendant Cutler—(Tr. 302, 319) as salesmen of siding. On February 9, 1954, petitioner called on Herbert Ray Johnson to sell him siding for his home (Tr. 96, 112). Johnson testified that petitioner advised him that if he purchased siding he would be paid $50 for each sale made by Consolidated in his district since his home was selected as a model to advertise the product (Tr. 97-99). Johnson told petitioner that he was ill and had other outstanding financial obligations and could not afford the purchase (Tr. 99, 101). Petitioner advised him that the $50 bonus arrangement would provide him with more than enough to pay for the siding and that he could keep the balance (Tr. 99). Petitioner also promised to give Johnson $300 to help pay his debts (Tr. 101). Johnson then agreed to make the purchase, and signed the loan papers because he thought he "had a good deal" (Tr. 100-101, 108-110). Present during the conversation and supporting Johnson's version of the transaction were his wife, Mrs. Ina O. Johnson, who also signed the loan papers, and his two brothers-in-law, Rollie and Tennyson Gidcumb (Tr. 142-171, 172-183, 277-295).

Johnson received the $300 promised by petitioner a week after the deal was closed, but received no $50 bonus payments (Tr. 103-106). He testified that peti-

tioner told him not to repeat anything concerning their conversation about these matters (Tr. 102).

On cross-examination, Johnson admitted that his home had needed siding (Tr. 112) but denied that he understood that the terms of the contract constituted the entire transaction (Tr. 119-120), or that the $50 bonus payments were to be made by Consolidated only if Johnson directly brought in other customers (Tr. 127-134).

The loan papers consisted of a Contract of Sale (Govt. Exh. 2b; Tr. 20-21), an F.H.A. Title I Credit Application (Govt. Exh. 2a; Tr. 20-21), and an F.H.A. Title I Completion Certificate (Govt. Exh. 2c; Tr. 20-21).

Under the contract, Consolidated agreed to furnish all labor and materials at a cost of $1390 to be financed under F.H.A. Title I. The contract made no mention of the $300 cash payment, or the $50 bonus for each additional siding job in Johnson's district.

The F.H.A. Title I Credit Application (Govt. Exh. 2a), dated February 9, 1954, did not contain an enumeration of Johnson's other existing obligations as required by its terms, although Johnson had told petitioner of these debts (Tr. 99-100). This application bore the signatures of Mr. and Mrs Johnson and petitioner. The F.H.A. Title I Completion Certificate bearing the signatures of Cutler and Herbert R. Johnson (Govt. Exh. 2c; Tr. 325) contained, *inter alia,* the following printed matter preceding Cutler's signature:

> (1) The above work or materials constitute the entire consideration for which this loan is made * * * (3) This Contract contains the whole agree-

> ment with the borrower (4) The borrower has not been given or promised a cash payment or rebate nor has it been represented to the borrower that he will receive a cash bonus or commission on future sales as an inducement for the consummation of this transaction. [Govt. Exh. 2c; Govt. Br. pp. 2-3.]

Johnson also certified in the completion certificate that no cash bonus or rebate had been made. His explanation was that he had not read the loan papers when he signed them because he was too excited, and "had confidence in it" (Tr. 107-108, 119-120).

The completion certificate and the other loan papers were submitted to the Old National Bank and checked for accuracy and completeness (Tr. 47-48). The loan was processed through the bank and insured by the F.H.A. (Pet. 5; Tr. 48).

Robert Brannon, a special agent of the F.B.I., testified for the government to an interview had with defendant Cutler on December 13, 1954. According to Brannon, Cutler told him that he gave petitioner $300 for Herbert Ray Johnson, knowing that said amount was not shown in the loan papers (Tr. 302). Cutler advised him further that he had instructed his salesmen individually not to employ the "model home" technique, and had no knowledge as to whether they used it (Tr. 303, 308-309). Immediately prior and subsequent to Brannon's testimony, and in his instructions, the trial judge advised the jury that Cutler's declarations could be used only against him and not against the other defendants (Tr. 297-300, 313, 855).

With respect to counts V and VI, the evidence

showed that def defendants Robertson and Jack Johnson[3] called on Curtis urtis O. Leach at his home for the purpose of selling him him siding (Tr. 202-203). According to Leach, Jack Jk Johnson promised him that, if he purchased siding, pg, his home would be used as a model and he would receiv ceive $50 as a bonus for every sale of siding in his neighbo hborhood, starting with his own purchase. Johnson lent nt him $100 to make the down payment (Tr. 203-207, 7, 210-211). About seven or eight weeks later Cutler ga gave him a check for the $50 (Tr. 211).

Both Jack Jk Johnson and Robertson testified in their own defense. e. They claimed that only after the sale was consumm nmated and the loan papers signed was Leach advised sed that if he referred customers of siding to Consolidat dated he would get a $50 bonus and that such agreeme nent was not part of the consideration for the sale. The hey denied any conversation that his home would be used sed as a model or that they had anything to do with the e completion certificate (Tr. 593-667, 613, 617-618, 676-7 3-702).

Evidence o of other previous siding transactions culminating in F F.H.A. insured loans involving the "bonus promise" an and "model home" technique was introduced by the e government. The court expressly limited the jury's con onsideration of these transactions to a showing of a comm nmon course of conduct, or knowledge, and not of a crim minal inclination or predisposition to commit the offe enses charged in the indictment (Tr. 352-353, 392-393 3, 418-419, 439-440, 855-856). Two such

[3] Jack Johnso son, one of the co-defendant salesmen, is to be distinguished from m Herbert Ray Johnson, the purchaser of the siding in the transacti tion involving petitioner and Cutler.

transactions were allegedly engineered by petitioner and Cutler. (Sale to William C. Becker in January 1954, Tr. 350-390, Govt. Exh. 8a, 8b, 8c, Tr. 363; sale to Robert C. Schaefer in January 1954, Tr. 391-407, Govt. Exh. 4a, 4b, 4c, Tr. 399). One transaction involved Cutler and an unidentified salesman. (Sale to Edward Stalely in October 1953, Tr. 408-440, Govt. Exh. 13a, 13b, 13c, Tr. 419). Two transactions involved Jack Johnson and Cutler. (Sale to J. Roy Adkisson in February 1954, Tr. 520-560, Govt. Exh. 7a, 7b, 7c, Tr. 531; sale to James R. Weber in February 1950, Tr. 441-502, Govt. Exh. 6a, 6b, 6c, Tr. 452). In each of these transactions, Cutler signed the Completion Certificate, while he or one of the salesmen signed the loan applications.

The trial judge in his instructions specifically advised the jury that they were "to pass on the evidence as it applies to each defendant separately in determining his guilt or innocence" (Tr. 842).

ARGUMENT

1. Petitioner argues (Pet. 9-14) that Rule 8 of the F.R. Crim. P. precluded a joint trial in the instant case since petitioner and the co-defendants were separately charged in counts involving separate, unrelated transactions. This contention has no substance. Authority to join petitioner and co-defendants in one indictment depends on whether the offenses charged "are of the same or similar character", and whether petitioner and the co-defendants were shown to have "participated in the same act or transaction or in the same series of acts or transactions constituting an of-

fense or offenses". Rule 8, F. R. Crim. P., *supra,* pp. 2-3. Failure to join all of the defendants in each count of such joint indictment would not, as petitioner argues, in itself render the joinder erroneous since Rule 8(b) specifically provides that "defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count".[4]

Here the indictment and the trial record clearly indicate that the offenses and the defendants were linked in a logical series of interrelated transactions which could properly be joined under the rule. Thus, both transactions involved salesmen of the Consolidated Home Improvement Company of Evansville, Indiana; both involved a strikingly parallel pattern of conduct

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[4] *McElroy* v. *United States,* 164 U.S. 76, 79-80, relied on by petitioner, was decided under former R.S. 1024 (2d ed., 1878) which did not contain the express language now embodied in Rule 8(b) permitting joinder regardless of whether all the defendants be charged in each count. See *United States* v. *Liss,* 137 F. 2d 995, 998 (C.A. 2), in which Judge L. Hand stated that "[t]he mere fact that the accused are different in two counts is no longer important, despite what was said in *McElroy* v. *United States* * * *." See also *Scheve* v. *United States,* 184 F. 2d 695, 697 (C.A. D.C.); *Kivette* v. *United States,* 230 F. 2d 749, 753 (C.A. 5). For the same reasons, *Castellini* v. *United States,* 64 F. 2d 636 (C.A. 6); *Gallaghan* v. *United States,* 299 Fed. 172 (C.A. 8), and *Coco* v. *United States,* 289 Fed. 33 (C.A. 8), all decided before adoption of Rule 8(b), are not in conflict with the instant case. Moreover, the essential ruling in *McElroy* was simply that the offenses charged in the several indictments were "separate and distinct, complete in themselves and independent of each other * * *." 164 U.S. at 79. Aside from the question of joinder of all defendants in all counts, the basic rationale of *McElroy* is consistent with the instant case since there, as here, the test was whether the transactions were separate or interrelated. Cf. *Ross* v. *United States,* 197 F. 2d 660, 664 (C.A. 6); *United States* v. *Tuffanelli,* 131 F. 2d 890, 893 (C.A. 7).

i.e. the "model home" and "bonus" technique; the overt acts charged were essentially similar; Cutler played the same role in each transaction; and evidence of past activity revealed like transactions involving Cutler and these and other salesmen. (See Statement, *supra*, pp. 3.)

In totality the transactions appear as related threads of a common all pervading plan. Indeed, petitioner and all the co-defendants could reasonably have been named in the general conspiracy count for the individual salesmen, "[b]y their separate agreements, if such there were, * * * became parties to the larger common plan, joined together by their knowledge of its essential features and broad scope, though not of its exact limits, and by their common single goal." *Blumenthal* v. *United States*, 332 U.S. 539, 558. That the defendants were instead charged in separate conspiracy counts could have worked only to petitioner's benefit.

There is no showing of actual prejudice from the joinder. The jury did not confuse the proof but—as revealed by the selectivity of its verdict—sorted it carefully and limited its application to those defendants against whom the particular evidence was admitted, in accordance with the trial judge's directions. Cf. *Dunaway* v. *United States*, 205 F. 2d 23 (C.A. D.C.).

2. Petitioner argues further (Pet. 15-18) that there was no evidence upon which the jury could properly base a finding that he and Cutler had unlawfully conspired since the evidence showed only that he made an improper sale. The facts set forth in the Statement

refute this contention. The evidence showed a consistent pattern of conduct among Cutler and his salesmen, including petitioner, and the use of the same techniques—the credit application signed by the salesman; the completion certificate signed by Cutler; the payment to the purchaser. From all the evidence, the jury could reasonably conclude—as it did—that petitioner and Cutler were acting pursuant to a preconceived plan. Under well settled principles of law, the verdict is amply supported by evidence. *Glasser* v. *United States,* 315 U.S. 60; *United States* v. *Aman,* 210 F. 2d 344, 349 (C.A. 7); *United States* v. *Thayer,* 209 F. 2d 534, 538 (C.A. 7); *United States* v. *Hack,* 205 F. 2d 723, 728 (C.A. 7).[5]

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[5] Petitioner argues (Pet. 17-18) that the only evidence from which the jury could find an unlawful agreement between petitioner and Cutler was the Brannon testimony, admitted only against Cutler, that Cutler admitted giving $300 to petitioner for Johnson (see Statement, *supra,* p. 6). This argument relies on the unsubstantiated premise that the jury disregarded the trial judge's explicit instructions and considered such testimony against petitioner. As pointed out by this Court in *Opper* v. *United States,* 348 U.S. 84, 95, "[o]ur theory of trial relies upon the ability of a jury to follow instructions * * *." As shown in the text, there was ample competent evidence to support the finding of conspiracy.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General,

WARREN OLNEY III,
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BEATRICE ROSENBERG,
JEROME M. FEIT,
Attorneys.

NOVEMBER 1956.

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